85-508

Supreme Court, U.S.
FILED
SEP 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1985

ARTHUR B. AVERY, SR.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Can a prosecutor's impermissible vouching for the credibility of his key witnesses in closing rebuttal argument be "harmless error" where the evidence of guilt is not overwhelming, credibility is the critical issue in the trial, and the trial court denies defense counsel's timely objection and request for a curative instruction?

II. Can a perjury charge that has no basis in fact be in "the same act or transaction or in the same series of acts or transactions" to sustain joinder with other different substantive offenses under Fed. R. Crim. P. 8(b)?

PARTIES BELOW

United States of America
Plaintiff-Respondent

Arthur B. Avery, Sr.
Defendant-Petitioner

Alisa D. Avery
Defendant-Respondent

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OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the Petitioner's conviction in *United States v. Avery*, 760 F.2d 1219 (11th Cir. 1985), a copy of which is attached as Appendix A. Rehearing was denied in *United States v. Avery*, 767 F.2d 1494 (11th Cir. 1985), a copy of which is attached as Appendix B.

JURISDICTION

Petitioner seeks review of the Eleventh Circuit's affirmance of his conviction on May 21, 1985, and its denial of his timely petition for rehearing on August 12, 1985. The jurisdiction of this court is invoked under 28 U.S.C.A. § 1254(1).

STATEMENT OF THE CASE

Petitioner Arthur B. Avery Sr. and Alisa D. Avery were tried jointly in federal district court on a multi-count indictment alleging a single charge of perjury before the grand jury by the Petitioner and drug and Travel Act violations by both. The Petitioner was acquitted of perjury and convicted on the remaining four charges. Co-defendant Alisa Avery was convicted on all counts, but the United States Court of Appeals for the Eleventh Circuit reversed her conviction for violation of her Sixth Amendment rights under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968). *United States v. Avery*, 760 F.2d 1219, 1223-24 (11th Cir. 1985). The Court affirmed the Petitioner's conviction. *Id.*

The Government conceded and the Eleventh Circuit recognized that the Petitioner's conviction rested solely on the testimony of two witnesses, Tracy Winn and Pete Schneider. *United States v. Avery*, 760 F.2d at 1221-22, 1223 n. 5; R 1/66, 76; 5/91-104, 136-42; Government's Brief p. 16.[1] While there was some limited documentary evidence, it merely served to corroborate a portion of Winn's testimony implicating co-defendant Alisa Avery on the Travel Act charges. 760 F.2d at 1221-22. No such corroborative evidence existed as to the Petitioner. (R 3/170-71). But for the testimony of Winn and Schneider, there was not a single shred of other evidence, documentary or otherwise, which in and of itself linked the Petitioner to the offenses for which he was convicted.

Accordingly, the credibility of Winn and Schneider was the critical issue at trial and the focal point of most of the collateral evidence. 760 F.2d at 1222, 1224. Facts were adduced by both sides casting serious doubt on the veracity of these two witnesses.

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[1] References to the record are, as in the Court of Appeals, to volume and page number. "Government's Brief" refers to the Government's Brief in the Eleventh Circuit.

The evidence showed that Tracy Winn was an accomplice in the offenses alleged in the indictment and that she was testifying pursuant to an immunity agreement. 760 F.2d at 1224; R 2/322-23; 3/209-210. At the time of trial, a number of Florida state felony charges for grand theft and forgery were pending against her. Significantly, Winn's victim in those offenses was co-defendant Alisa Avery, against whom she testified. (R 3/178-80).

Also an alleged accomplice, Pete Schneider was originally charged in the indictment as a co-defendant. A previously convicted state and federal felon, Schneider made a plea bargain with the Government in return for his testimony and therefore did not stand trial. (R 2/319-21, 4/138-39).

Both Winn and Schneider testified at trial that during the time frame of the indictment they were actively and extensively involved in illegal drug activities. Both were tainted by admitted heavy and habitual use of illegal narcotics during the relevant time period. (R 3/93, 186, 191-92; R 4/129, 140.) Further, there was evidence that Schneider had stated that he would avoid incarceration by placing the blame on the Averys. (R 5/13).

During the Government's case in chief, Winn testified on direct examination that she had been accepted into the federal witness protection program and that she had therefore been reimbursed for expenses and paid a subsistence allowance. (R 3/159-60). Stating that he would not have brought this fact to the jury's attention, Petitioner's trial attorney objected to this line of questioning and moved for mistrial. (R 3/161A). The district judge denied the motion but admonished the prosecutor that by eliciting this information during direct examination, he had "poison[ed] the well." (R 3/159-161B). Accordingly, without objection, Petitioner's attorney cross-examined Winn concerning this subject and, as the Eleventh Circuit's opinion notes, mentioned it briefly in closing argument.[2] 760 F.2d at 1224 n. 8; R 3/183-85; 5/117.

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[2] Referring to Winn's direct testimony concerning payments received by her under the government's witness protection program, (R 3/159-160), defense counsel stated "Tracy Winn is literally the best testimony money can buy, for a $4,800.00 downpayment and $1,500.00 a month." 760 F.2d at 1224.

In his closing rebuttal argument, the government attorney focused almost exclusively on the "key element" of the case, 760 F.2d at 1224, the credibility of Winn and Schneider. The prosecutor told the jury that it could acquit the defendants only if it believed that Winn and Schneider had lied and that the United States government had conspired with them to do so, stating:

> If you are going to come up with a reason for the testimony presented by those witnesses and if that reason is going to be that you have concluded that they have lied out of some motivation that was improper then you should acquit these Defendants. Is that what you believe? Was there anything in the testimony concerning their agreements as to what they would do that suggested these agreements were based on lying? Were those agreements based on the necessity of their ensuring or doing good enough to convict somebody? We suggest to you there is no evidence of that. *If you were to believe that, ladies and gentlemen, then you would have to believe that the Government of the United States is an active participant with them in that conspiracy.*
>
> MR. WINKLES: Your Honor, I have an objection. Make it timely now and reserve it for later?
>
> THE COURT: You may reserve it for later. Go ahead.
>
> BY MR. ATKINSON: If you believe that then you would let these Defendants go.

760 F.2d at 1224; R 5/141 (emphasis supplied). Arguing these remarks constituted improper vouching for the credibility of Winn and Schneider, Petitioner's attorney moved for mistrial and requested a curative instruction. The motion and request were denied by the district court judge. (R 5/146-48, 182-83).

On direct appeal the Eleventh Circuit rejected the Petitioner's contention that his conviction must be overturned because of the prosecutor's improper vouching. At first the Court of Appeals held that the prosecutor's vouching remarks in closing rebuttal argument were justified as "invited reply" to defense counsel's single statement in closing argument concerning Winn's receipt

of payments under the witness protection program. *United States v. Avery*, 760 F.2d. at 1224. It was brought to the Court's attention in the Petition for Rehearing, however, that the panel's invited reply analysis examined the prosecutor's remarks only "in the context of the entire *closing argument*," 760 F.2d at 1224 (emphasis supplied), and not in the context of the entire trial and record as required by the Supreme Court's recent decision in *United States v. Young*, ____ U.S. ____, ____; 105 S.Ct. 1045, 1047 (1985). Accordingly, in its opinion denying rehearing, the Eleventh Circuit assumed the prosecutor's remarks "exceeded permissible bounds" and, citing *Young* and *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. (1974), 76 L.Ed. 2d 96 (1983), affirmed Petitioner's conviction under the harmless error rule. *United States v. Avery*, 767 F.2d 1494, 1495 (11th Cir. 1985).

Also rejected by the Eleventh Circuit but not analyzed in its opinion on rehearing was the Petitioner's claim that the perjury charge against him had been misjoined with the other four counts of the indictment under Rule 8(b), Fed. R. Crim. P. The perjury count, of which the Petitioner was acquitted, alleged that the Petitioner falsely denied knowing of his daughter Alisa's first involvement with drugs. *United States v. Avery*, 760 F.2d at 1221. Because the Government was unable at trial to indicate *any* facts it could prove to show the falsity of Petitioner's denial, Petitioner argued on appeal that the perjury charge was not sufficiently related to the other four offenses to sustain joinder under Rule 8(b).

The Court of Appeals held the perjury charge was properly joined with the other counts of the indictment. The Court based its holding on the Petitioner's grand jury testimony and the fact that "the Government contended at trial" that to believe the Petitioner perjured himself, the jury had to also believe that he participated in the other counts. 760 F.2d at 1222.

REASONS FOR GRANTING THE WRIT

I. BY HOLDING THE PROSECUTOR'S VOUCHING REMARKS "HARMLESS ERROR", THE ELEVENTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH ALL FEDERAL APPELLATE DECISIONS CONSIDERING THE SAME DETERMINATIVE FACTORS AND SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR EXERCISE OF THE SUPREME COURT'S SUPERVISORY POWERS.

In conflict with apparently every federal appellate decision construing the same decisive elements, the Eleventh Circuit Court of Appeals held the prosecutor's vouching for the credibility of his witnesses in this case was harmless rather than prejudicial error. Moreover, the Eleventh Circuit's first opinion erroneously characterized the prosecutor's remarks as "invited reply," even though the remarks did not respond to any specific statement of defense counsel that was improper. Consequently, as the following review of the relevant cases clearly demonstrates, the decision below seriously undermines and directly conflicts with the fundamental principles governing application of the harmless error and invited reply rules. Certiorari should be granted.

A. *The prosecutor's remarks were not "harmless error."*

Precisely on point and in all relevant respects identical to the instant case but reaching exactly the opposite result is *United States v. Dorr*, 636 F.2d 117 (5th Cir. Unit A 1981). Careful research has yielded no decision from any jurisdiction more closely resembling the instant one. In the same basic circumstances and on the same critical elements, the Fifth Circuit held in *Dorr* that the Government attorney's misconduct could not be considered harmless error. Point-by-point comparison of this case with *Dorr* lays bare the Eleventh Circuit's significant error and the conflict that it generates.

In *Dorr* as here, the crux of the jury's decision and the determinative factor at trial was the credibility of the Government's

main witness. 636 F.2d at 120-21. Also as in this case, there was no evidence in *Dorr* which in and of itself implicated the defendant except for the testimony of the same witness whose credibility was impermissibly bolstered by the prosecutor's closing rebuttal argument. *Id.* at 119, 121.

Thus, as here, the evidence of guilt in *Dorr* was not overwhelming. *Id.* at 121. Utilizing the same improper tactic employed in this case, the *Dorr* prosecutor suggested incorrectly that to acquit the defendant, the jury would have to believe that the United States Government conspired with its key witness to lie, when in fact no such argument by defense counsel was ever presented. *Id.* at 120-21. Finally, as in this case, the district judge in *Dorr* refused to give a curative instruction. *Id.* The Fifth Circuit concluded:

> If there had been other untainted witnesses who testified against Dorr or concrete, irrefutable documentary evidence, we may have found the argument in this case to be harmless error. But when the prosecutor's comments directly affected the ultimate and only testimony against Dorr, it cannot be considered harmless error.

636 F.2d at 121.

All other federal appellate decisions on point support the conclusion that the instant vouching cannot constitute harmless error. Much like the case at hand, in *United States v. Phillips*, 527 F.2d 1021, 1022-23, 1025 (7th Cir. 1975), the prosecutor stated in closing argument that to render a not guilty verdict, the jury had to first find that he was "conspiring" with his witness to violate the defendant's rights. The Seventh Circuit recognized that this particular argument is "vouching to the utmost degree...[which]...amounts to placing the prosecutor in the same conspiratorial nest with the witness." *Id.* at 1025. Because as here the statements were highly prejudicial, credibility was the most important issue for the jury to resolve, and the trial court refused to take corrective action, the Court of Appeals reversed the defendant's conviction and remanded for new trial. *Id.* at 1022, 1025.

Evaluation of the witnesses' credibility was again the jury's principal task in *United States v. West*, 680 F.2d 652, 657 (9th Cir. 1982). Again improperly alluding to a nonexistent defense conspiracy theory, the *West* prosecutor sought to bolster the credibility of a key government witness by making the following statement in closing argument, strikingly similar[3] to the misconduct here:

> If you believe this to be a conspiracy against this defendant, that we have joined [our witness], and that we have all conspired to convict this man, then acquit him. You have no choice.

680 F.2d at 655.

Since, as in *Dorr* and *Phillips*, the *West* prosecutor's vouching went directly to the pivotal credibility question, the Ninth Circuit recognized that the Government's misconduct may well have had a material effect on the verdict. 680 F.2d at 656-57. The Court accordingly reversed the defendant's conviction. *Id.* at 657.

Other decisions involving a variety of factual settings but the same determinative elements as *Dorr*, *Phillips* and *West* emphasize the conflict generated by the Eleventh Circuit's incorrect harmless error holding here. For example, while it was the Government's I.R.S. agent witness rather than the prosecutor who bolstered the credibility of other key Government witnesses in *United States v. Price*, 722 F.2d 88, 89-91 (5th Cir. 1983), as in this case credibility was a crucial issue and the district court judge refused to give a proper curative instruction. Also as in this case, the jury acquitted the defendant of perjury while convicting him of other offenses. Rejecting the Government's harmless error argument, the Fifth Circuit made the following statement, which applies with equal force here:

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[3] The prosecutor stated in this case:

If you were to believe that [Winn and Schneider lied because of their agreements with the Government], ladies and gentlemen, then you would have to believe that the Government of the United States is an active participant with them in that conspiracy... if you believe that then you would let these Defendants go.
(R 5/141).

> [The jury] found Price guilty on the conspiracy count, presumably crediting the testimony that he had received gratuities, but acquitted him of the perjury charge and of tax evasion. These results appear inconsistent, but they mean at least that the jury was not prepared to find Price completely culpable. In practical terms, the Government's case hinged on the testimony of the witnesses whose credibility was bolstered by [the I.R.S. agent's] testimony.

722 F.2d at 90-91. Price's conviction was accordingly reversed. *Id.* at 91.

Three additional Circuit Court decisions involving the same crucial elements in this case further emphasize the instant conflict. In *United States v. Vargas*, 583 F.2d 380, 387 (7th Cir. 1978), the fact that "the prime issue was credibility" was critical to the Seventh Circuit's determination that the prosecutor's improper argument was not harmless. Reversal was required in *United States v. McPhee*, 731 F.2d 1150, 1152-53 (5th Cir. 1984), because the prosecutor's closing argument was prejudicial, the trial court failed to give a cautionary instruction, and the evidence of guilt was not overwhelming. Finally, in *United States v. Garza*, 608 F.2d 659, 665-66 (5th Cir. 1979), the most important issue before the jury was credibility, and the prosecutor's vouching comments were expressly intended to influence the jury's resolution of that question. The prosecutor's argument was accordingly held "plain error" and the conviction was reversed despite defense counsel's failure to make a timely objection. *Id.* at 666.

The Eleventh Circuit's summary disposal of this case on rehearing under the harmless error rule cites two recent Supreme Court decisions, *United States v. Young*, ____ U.S. ____, 105 S.Ct. 1038, 84 L.Ed. 2d 1 (1985) and *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed. 2d 96 (1983). Neither case dispels the above conflict nor undermines the holdings of the Courts of Appeals decisions from which it arises. To the contrary, examination of *Young* and *Hasting* provides additional support for the conclusion that the Eleventh Circuit's application of the harmless error rule here departs so substantially from the

analysis normally followed and so sharply conflicts with the decisions of other federal courts that this is precisely the sort of case the Supreme Court should resolve on certiorari.

Young, which was first brought to the Eleventh Circuit's attention in this proceeding by Petitioner's request for rehearing, is a "plain error" rather than a "harmless error" case. It turned on two key factors—the presence of "overwhelming" evidence of guilt and defense counsel's failure to object to the prosecutor's statements or request a curative instruction. 105 S.Ct. at 1042, 1049. As noted, in this case these two factors weigh heavily in Petitioner's favor. The evidence was not overwhelming, and the defense attorney made a timely request for a curative instruction, which the district court refused.

Further, as the Supreme Court's most recent consideration of the invited reply rule in general and of improper vouching in particular, *Young* does not diminish or otherwise mitigate the gravity of the type of prosecutorial misconduct presented here. To the contrary, *Young* reaffirms the seriousness of the dangers associated with the government attorney's vouching for the credibility of witnesses and expressing his personal opinion concerning an accused's guilt. It repeats the admonition of *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), that it is the prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction..." 105 S.Ct. at 1042, 1048. Accordingly, sustaining the Eleventh Circuit's reliance on *Young* on these extreme facts would confuse and undercut the case's holding and do violence to the basic principles of fairness that it reaffirms.

The Court of Appeals' reliance on *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. (1974), 76 L.Ed. 2d 96 (1983), is similarly misplaced. Consistent with *Young* and the above Courts of Appeals cases, it was critical to the Supreme Court's decision in *Hasting* that there existed "overwhelming" record evidence of the defendant's guilt. 103 S.Ct. at 1982. The Supreme Court's holding was heavily influenced by the fact that the existence of this over-

whelming evidence was made plain by the Seventh Circuit's "own explicit statement" in its opinion below. *Id.* at 1981.

Equally compelling but dictating a completely opposite result is the Eleventh Circuit's "own explicit statement" here. The opinion below shows unequivocally that credibility was the "key element" in this case and that the prosecutor's vouching went directly to the credibility of Winn and Schneider, whose testimony was the ultimate and only evidence against the Petitioner. *United States v. Avery*, 760 F.2d at 1221-22, 1224. Moreover, in reviewing the evidence in the context of the *Bruton* violation that compelled reversal of co-defendant Alisa Avery's conviction, the Court of Appeals stated:

> The essence of the Government's case was the testimony of Tracy Winn. Her testimony was corroborated in part by Pete Schneider and also by documentary evidence that verified specific parts of her testimony concerning travel to different locations to distribute cocaine. Due to the fact that the credibility of Winn and Schneider was the key element in this trial and the fact that Winn was an accomplice, *we find the evidence of guilt was not so overwhelming as to render the Bruton violation harmless error.*

760 F.2d at 1223-24 (emphasis supplied).

In light of this express finding, it is significant that the evidence against the Petitioner was even weaker than that which the Eleventh Circuit found not "overwhelming" as to his co-defendant. Unlike Alisa Avery, 760 F.2d at 1221-22, there was no separate corroborative evidence linking Petitioner to the charges, so that the case against him rested entirely on the testimony of the same witnesses the prosecutor bolstered, Winn and Schneider. In view of this fact, the Court's assessment that the evidence was not so overwhelming as to render the *Bruton* error harmless in Alisa Avery's case is even more compelling in the context of the vouching error in the Petitioner's case. As with *Young*, therefore, the pertinent considerations in *Hasting* support Petitioner's position in this proceeding.

In conclusion, the relevant decisions show that the question of whether improper Government vouching is prejudicial rather than harmless error depends on several pivotal elements, including the importance of the issue affected, the efficacy of any cautionary instructions, and the strength of the untainted evidence of guilt. In this case, all of the determinative factors figuring into the harmless error calculus compel reversal: The prosecutor vouched for the credibility of the only witnesses providing evidence against the Petitioner, and those witnesses' credibility was the "key element" in this trial. *Dorr*, *Phillips*, *West*, *Vargas*, *Price*, and *Garza*. The offending remark, which referred to a nonexistent defense theory that the government was conspiring with its witnesses, was "vouching to the utmost degree." *Phillips*. It incorrectly imposed as a precondition to acquittal the finding that such a conspiracy existed, and improperly gave the imprimatur of government approval to witnesses of otherwise dubious credibility. *Phillips*, *Dorr*, and *West*. Defense counsel made a timely request but was refused a curative instruction. *Young*, *Dorr*, *Phillips*, *McPhee* and *Price*. Finally, the evidence of guilt was, as the Eleventh Circuit's own affirmative statement indicates, not "overwhelming." *Young*, *Hasting*, *Dorr*, *West*, *McPhee*, and *Price*.

In terms of every important and relevant factor under the Supreme Court and Circuit Court decisions, the prosecutor's misconduct in this case far exceeds the bounds of the harmless error rule. Accordingly, the Eleventh Circuit's holding directly conflicts with the decisions of all other jurisdictions that have addressed this issue and so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers. The Petition for Certiorari should be granted.

B. *The prosecutor's remarks were not "invited reply."*

As noted, in its opinion denying the Petition for Rehearing, the Eleventh Circuit bottomed its decision in this case on the harmless error rule. Nevertheless, in the event the Government

attempts in this proceeding to resurrect and rely on the "invited reply" analysis in the Court of Appeals' first opinion, an additional basis for invoking this Court's jurisdiction will exist: The Eleventh Circuit's initial characterization of the prosecutor's vouching remarks as "invited reply" conflicts with the decisions of both this Court and other Circuits, since the prosecutor's comments were not invited by or in response to any improper statement of defense counsel.

First, an impermissible prosecutorial remark cannot be excused as invited reply unless it rebuts some defense statement that was in itself legally out-of-bounds and therefore deserving of reply. *United States v. Young*, 105 S.Ct. at 1045-46 ("defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant"); *United States v. Saenz*, 747 F.2d 930, 939 (5th Cir. 1984) ("A prosecutor may respond in rebuttal to *improper* arguments by defense counsel, even though such a response might not be permissible in the absence of provocation") (emphasis supplied). Here, the single statement of the defense attorney noted in the Eleventh Circuit's first opinion was not improper because it went directly to witness Winn's receipt of substantial benefits under the witness protection program. This information was first elicited by the government in its case-in-chief over defense objection and motion for mistrial, and defense counsel had an unquestioned right to cross-examine and comment on it. *See United States v. Melia*, 641 F.2d 672, 676 (4th Cir. 1982); *United States v. Martino*, 648 F.2d 367, 388 (5th Cir. 1981); *United States v. Partin*, 552 F.2d 621, 645 (5th Cir. 1977).

Further, this Court has recently recognized that had the prosecutor in this case viewed the defense summation in some way improper, his first duty was to object with a request for a timely warning and a curative instruction to the jury. *United States v. Young*, 105 S.Ct. at 1045-46. The prosecutor here, however, did not object to either defense counsel's cross-examination concerning Winn's receipt of witness protection plan monies or to his statement in closing argument impeaching her on that basis. Instead, there is nothing in the record indicating either the government or the district judge considered the defense lawyer's statement anything more than fair comment on the evidence. Even

the Eleventh Circuit's opinion refrains from declaring it improper. Thus, in the absence of like defense misconduct, the Government's improper vouching cannot be deemed invited reply.

Second, a comparison of the prosecutor's remarks with the purportedly provoking defense comment conclusively demonstrates that the former cannot be an "invited reply" to the latter because it in no way responds to or rebuts it. In this regard, the rule is that prosecutorial vouching cannot be justified as invited reply unless, as a threshold matter, it is "specifically done in rebuttal to assertions made by defense counsel." *United States v. Dorr*, 636 F.2d at 120; *United States v. Canales*, 744 F.2d 413, 424 (5th Cir. 1984) (holding prosecutorial vouching must be considered in light of the argument to which it responded). This specific rebuttal prerequisite is implicit in the Supreme Court's recent decision in *United States v. Young*, which contemplates for application of the invited reply rule the existence of a "response-in-kind" relationship between the remarks in question so that it can be determined whether an otherwise impermissible prosecutorial comment did more than simply "right the scale." 105 S.Ct. at 1045. Further, this requirement is a logical corollary of the general rule that the prosecutor cannot use rebuttal to advance new arguments, but must instead respond to the particular points made by defense counsel in closing argument. *United States v. Taylor*, 728 F.2d 930, 937 (7th Cir. 1984).

Applying these principles to the facts at hand and considering the prosecutor's vouching in the context of the entire trial as required by *Young*, the improper remarks were clearly not "specifically done in rebuttal to assertions made by defense counsel." To the contrary, nothing in the Government's closing rebuttal, including the specific vouching remarks in issue here, mentions or even purports to meet the single defense comment the Eleventh Circuit identified. Indeed, the record clearly shows that the prosecutor's bolstering differed completely from the defense attorney's statement both as to persons and subjects addressed: The prosecutor vouched for the credibility of *both* of the Government's two key witnesses, Tracy Winn and Pete

Schneider, while the single defense remark in issue impeached *only* witness Winn. The subject of the defense statement—Winn's receipt of sizeable Government payments under the witness protection program—is not even mentioned in the Government's closing rebuttal argument. Finally, the prosecutor stated that to acquit the Petitioner, the jury would have to believe that the United States Government conspired with both Winn and Schneider to lie, when in fact no such argument was ever presented by defense counsel.

Moreover, as noted, despite repeated opportunities to do so, at no time during the trial did the Government object or even suggest that the defense remark was improper or merited a response in any terms, much less in the terms used here. Perhaps most telling, even when confronted with Petitioner's motion for mistrial, neither the prosecutor nor the district court judge ever stated or implied that the Government lawyer's misconduct was somehow justified as an answer to the defense attorney's one comment.

In sum, the record shows the Government's hindsight reliance on the invited reply concept in the Circuit Court is nothing more than a belated appellate excuse for comments otherwise indefensible on the merits. Because in the context of the entire record the defense lawyer's single statement was not improper under the specific circumstances and because the prosecutor's vouching did not specifically rebut it, the invited reply analysis employed by Court of Appeals in its first opinion conflicts with and substantially departs from decisions of United States Supreme Court and the other Circuits. Perhaps more importantly, even if the prosecutor's remarks could be fairly characterized as "invited reply," analysis of them under the harmless error rule, as set forth in I.A. supra, would still be required. *United States v. Young*, 105 S.Ct. at 1045 n. 10. Accordingly, should the Government take the position in this proceeding that the question of the Government's misconduct is resolved by the Eleventh Circuit's initial analysis, there will exist additional reasons for granting review on certiorari.

II. BECAUSE THE PERJURY CHARGE WAS WHOLLY WITHOUT FACTUAL BASIS, IT WAS IMPOSSIBLE TO HOLD THAT IT WAS "IN THE SAME ACT OR TRANSACTION OR IN THE SAME SERIES OF ACTS OR TRANSACTIONS" AS THE OTHER OFFENSES CHARGED IN THE INDICTMENT.

At trial, there was a complete failure of proof of the Petitioner's guilt on the perjury offense. The indictment charged the Petitioner with falsely denying having knowledge of his daughter's first involvement with drugs. There is absolutely nothing in the record to indicate, however, how or why the Petitioner's denial was false, or even what facts the Government had to prove to show its falsity. Indeed, at trial the prosecutor was not able to proffer or even hypothesize either the date of Alisa Avery's first involvement with drugs or the date of Petitioner's knowledge of that first involvement. To the contrary, when asked at sidebar whether he could represent that the Government could "show for a fact" these dates, the prosecutor stood mute.[4] (R 3/154B-154C). The Petitioner was accordingly acquitted by the jury of that count.

Under Rule 8(b), Fed. R. Crim. P., "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The mere existence of some common facts underlying different counts does not render allegations sufficiently related. Instead, the rule in the First and Fifth Circuits, cited approvingly by the Eleventh Circuit in this case, is that for proper joinder under Rule 8(b), the charges must be such that "essentially the same facts must be shown for each of the consolidated

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[4] The following colloquy occurred at sidebar during trial:

MR. WINKLES: I will ask the Court, can the Government represent to the Court that they know for a fact when she first got involved and that he knew? Can they show the first time, because I don't believe they can.

That is the problem with trying to defend that kind of question, because—because their own witness is going to say she was involved back in high school. Mr. Schneider who I am referring to.

THE COURT: What do you have to say? Anything?

MR. ATKINSON: No, Your Honor.

(R 3/154B-154C).

crimes." *United States v. O'Connell*, 703 F.2d 645, 648 (1st Cir. 1983); *United States v. Gentile*, 495 F.2d 625, 630-31 (5th Cir. 1974). Similarly, this Court held in the seminal decision of *McElroy v. United States*, 164 U.S. 76, 81, 17 S.Ct. 31, 33 (1896) that severance is required where "the parties are not the same, [and] the offenses are no wise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them."

Based on the Government's inability to prove or even proffer the facts necessary to show guilt on the perjury charge, Petitioner argued on appeal that it was impossible to declare that there existed a relationship between the perjury offense and the other substantive counts such that "essentially the same facts must be shown for each." The Eleventh Circuit rejected this argument, stating:

> Mr. Avery testified before a previous grand jury about events related to the substantive counts he and his daughter were tried for in this case. The *Government contended* at trial that in order to believe that Mr. Avery perjured himself, the jury had to believe that he participated in the conspiracy alleged in the substantive counts. Therefore, the facts underlying the perjury and the other counts were sufficiently related so that they can be deemed to be a part of the same transaction.

United States v. Avery, 760 F.2d at 1222. For three main reasons, this analysis is fundamentally flawed and represents a serious departure from the procedure normally followed in addressing the merits of a claim of misjoinder under Rule 8(b).

First, the Eleventh Circuit erred in looking to the entirety of the Petitioner's previous grand jury testimony in its search for facts common to the nonperjury counts. Contrary to the Court's analysis, joinder in a multi-count, multiple defendant indictment that combines a single perjury charge with other substantive counts does not depend on whether an examination of the entire

transcript of a defendant's grand jury testimony might uncover some nonperjurious statements for which the defendant was not charged that in some way relate to the other offenses.[3] No authority has been cited or found establishing such a rule. Instead, as in *O'Connell*, where a perjury charge is joined with other offenses, the determinative Rule 8(b) issue is whether the facts necessary to prove the *perjury* are "essentially the same" as the facts that must be proved for the other crimes. 703 F.2d at 648. Since the nonperjurious statements do not form the basis of any charge in the indictment, the facts underlying them need not be proved and their potential relatedness to other charges is simply irrelevant.

The Eleventh Circuit's error does not, of course, hinge on the mere fact of Petitioner's acquittal on the perjury charge. Instead, looking specifically to the perjury offense, there is absolutely nothing in this record to indicate what facts had to be proved to show the Petitioner's statement false, and the Government has never claimed that there is. It is therefore impossible to hold that the facts needed to prove the perjury charge were "essentially the same" as the facts needed to prove any of the other counts.

Second, the Eleventh Circuit's own review of the trial evidence supports the conclusion that the counts were misjoined. The Government conceded and the Court of Appeals recognized that had the perjury count been severed, evidence concerning it might not have been admitted in the separate trial on the other charges. *United States v. Avery*, 760 F.2d 1223 n. 5; Government's Brief, p. 16. The Government further conceded and the Circuit Court again agreed that the prosecutor's case against the Petitioner on the four nonperjury counts rested on the testimony of witnesses Winn and Schneider, not on any perjury count evidence. *Id.* These concessions, coupled with the Government's inability and the Eleventh Circuit's failure to identify any facts

[3] This discussion assumes for purpose of argument that Petitioner's grand jury testimony was related to all of the other four charges in the indictment. Careful review of the transcript of the grand jury testimony reveals that it was not.

that had to be proved to convict the Petitioner of perjury show the offenses "must depend upon a different state of facts as to each of some of them." *McElroy v. United States*, 164 U.S. at 81. They accordingly negate the Court's conclusion that the perjury offense was "part of the same transaction" as the other charges.

Third, the Eleventh Circuit's error is exacerbated by its adoption of the Government's argument that the instant joinder can be sustained because "the Government contended at trial" that to believe the Petitioner committed perjury, the jury also had to believe he was guilty of the other offenses. *United States v. Avery*, 760 F.2d at 1222. Assuming the Government in fact advanced this contention at trial[6], no case from any jurisdiction has been presented or found supporting the proposition that in analyzing the propriety of joinder under Rule 8(b), an appellate court can consider the prosecutor's self-serving argument to the judge or to the jury that the counts were sufficiently related. Indeed, such reliance on what the "Government contended" would effectively eliminate Rule 8(b)'s requirement that the charges be "in the same act or transaction or in the same series of acts or transactions," and clearly conflicts with the rule of *O'Connell* and *Gentile* that essentially the same facts must be shown for each of the consolidated offenses.

Of equal significance are the obvious and overwhelming dangers inherent in this "Government contention" test. If Rule 8(b) joinder is made to depend even in part on the prosecutor's mere assertion that counts are interdependent, the ultimate consequence will be that in every case without restriction the Government will be permitted to join in a single indictment any and all charges it desires, regardless of factual separateness or prejudice to defendants. Indeed, the Eleventh Circuit's opinion will encourage the joinder of disparate counts, since prosecutors will now know that potential appellate difficulties are easily averted

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[6] Neither the Government's brief below nor the Eleventh Circuit's opinion indicate where in the record the prosecutor made this argument.

by merely arguing at trial that the charges are interrelated, as in the instant case, where the Government attorney urged the jury "had to believe" the Petitioner guilty of one set of offenses to convict him of another.

The Court of Appeals' analysis of the joinder issue in this case is badly flawed and must be corrected. As written, the Eleventh Circuit's opinion encourages the imprudent and even abusive inclusion in federal indictments of unrelated and baldly defective counts. Further, it provides dangerous precedent for affirming joinder merely on the prosecutor's "say so," even though the Government's concessions and the Court's own review of the record reveals the separate factual matrices of the consolidated offenses. In short, the Court of Appeals' decision in this case ignores the requisites of Rule 8(b), directly conflicts with the cases construing it, and departs substantially from the procedure and analysis normally followed in resolving misjoinder issues. Certiorari should therefore be granted.

CONCLUSION

Special and important reasons compel review of this case on writ of certiorari. The Eleventh Circuit's analyses of both the prosecutor's vouching and the joinder of the perjury count directly conflict with the decisions of the Supreme Court and other Courts of Appeals on the same matters and seriously depart from the accepted and usual course of judicial proceedings for resolving these issues. It is therefore respectfully requested that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the U.S. Attorney's Office, 500 Zack Street, Room 410, Tampa, Florida 33602, and to Claude H. Tison, Jr., Esquire, P.O. Box 1531, Tampa, Florida, 33602, this 23rd day of September, 1985.

Stuart Mark

Attorney

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARTHUR B. AVERY, SR., ALISA D. AVERY,
Defendants-Appellants.

No. 84-3084.

United States Court of Appeals,
Eleventh Circuit.

May 21, 1985.

Defendants were convicted before the United States District Court for the Middle District of Florida, Ben Krentzman, J., of federal narcotics laws violations, and they appealed. The Court of Appeals, Clark, Circuit Judge, held that: (1) there was no misjoinder as to defendant who was also charged with perjury; (2) as to other defendant, admission of first defendant's grand jury testimony that other defendant had sold drugs and obtained drugs to sell to people provided specific and compelling prejudice to warrant severance; and (3) defendants could not complain of invited rebuttal argument by prosecutor.

Affirmed in part, reversed in part and remanded.

1. Indictment and Information 124(1)

Federal Rule of Criminal Procedure governing joinder of defendants in the same indictment or information is designed to prevent accumulation of prejudice that occurs when several defendants are charged with similar but unrelated offenses. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

2. Indictment and Information 124(1)

Generally, test for whether counts are misjoined under Federal Rule of Criminal Procedure governing joinder of defendants in a multiparty indictment is whether acts alleged in indictment are unified by some substantial identity of facts or participants. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

3. Criminal Law 1167(1)

If counts are improperly misjoined under Federal Rule of Civil Procedure governing joinder of defendants, misjoinder is prejudicial per se. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

4. Criminal Law 622.2(3)

Even if counts are properly joined under Federal Rule of Criminal Procedure governing joinder of defendants, defendant is still entitled to severance if he can show specific and compelling prejudice due to counts being joined. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

5. Indictment and Information 124(1)

Where Government contended at trial that in order to believe that defendant perjured himself, jury had to believe that he participated in conspiracy which was alleged in substantive counts of indictment, facts underlying perjury in other counts were sufficiently related so that they could be deemed part of same transaction for purpose of Federal Rule of Criminal Procedure governing joinder. Fed.Rules Cr.Proc.Rule 8, 18 U.S.C.A.

6. Criminal Law 622.2(3)

In prosecution for violating federal narcotics laws and perjury before grand jury, reference to separate criminal case and reference to gambling on professional sports did not give rise to specific and compelling prejudice so as to warrant severance. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

7. Criminal Law 622.2(8)

Admission of out-of-court statement admissible only against one nontestifying codefendant that implicates another codefendant can present compelling prejudice that requires severance, regardless of whether trial court gives limiting instruction. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

8. Criminal Law 622.2(7)

In prosecution for violation of federal narcotics laws, admission of nontestifying codefendant's grand jury testimony that defendant had sold drugs and obtained drugs to sell to people provided specific and compelling prejudice to warrant severance. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

9. Criminal Law 422(1)

Any extrajudicial statement of one defendant, not otherwise

admissible against his codefendant, may not be introduced in codefendant's trial. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

10. Criminal Law 726

If defense counsel's statement involves attack on Government and its conduct of case, prosecutor may present what amounts to a boisterous argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon Government or its witnesses.

11. Criminal Law 726

Defendants could not complain that prosecutor's rebuttal statement constituted error where Government's argument was direct response to and was provoked by defense counsel's argument.

Stuart C. Markman, Tampa, Fla., for A.B. Avery.

Claude H. Tison, Jr., Tampa, Fla., for A.D. Avery.

Lee Atkinson, Asst. U.S. Atty., Tampa, Fla., Janis Kockritz, U.S. Dept. of Justice, Washington, D.C., for United States.

Appeals from the United States District Court for the Middle District of Florida.

Before RONEY and CLARK, Circuit Judges, and SIMPSON, Senior Circuit Judge.

CLARK, Circuit Judge:

Arthur B. Avery, Sr. and Alisa D. Avery were convicted on four counts for violating the federal narcotics laws.[1] Arthur B. Avery, Sr. was acquitted on one count of perjury before the

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[1] The appellants were convicted on the following counts: (1) conspiring to distribute marijuana, cocaine and quaaludes in violation of 28 U.S.C. § 841(a)(1) and 21 U.S.C. § 846; (2) causing interstate travel with the intent to promote an illegal business enterprise involving controlled substances in violation of 18 U.S.C. §§ 1952 and 2; (3) causing an interstate money order to be sent for the purpose of distributing the proceeds of an illegal business enterprise in violation of 18 U.S.C. §§ 1952 and 2; and (4) possessing cocaine with the intent to distribute it in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

grand jury.[2] In this appeal the appellants raised the following issues: (1) whether the indictment against the appellants properly joined the four drug related counts with the perjury count against appellant Arthur B. Avery and whether the admission of evidence on the perjury count violated Alisa Avery's confrontation rights; and (2) whether the prosecutor impermissibly vouched for the credibility of the government's key witnesses during rebuttal and closing argument. We affirm the conviction of Arthur B. Avery, Sr. but reverse the conviction of Alisa D. Avery.

I. FACTS

Arthur B. Avery, Sr. and his daughter Alisa D. Avery were indicted along with Pete Schneider for conspiracy to deal in cocaine, methagualone, marijuana, and other related offenses in 1983. The indictment additionally charged Arthur Avery with two counts of prejury alleging that he falsely denied knowing how his daughter Alisa Avery first became involved with drugs. Prior to trial both Arthur and Alisa Avery moved to sever the perjury counts against Arthur Avery from the counts charging both with cocaine offenses based upon Fed.R.Crim.P. 8 and 14. The district court granted the motion as to one of the perjury counts but did not sever the other perjury count. Subsequently and prior to trial, Pete Schneider pled guilty and offered testimony that he had received cocaine from and sold cocaine to Arthur and Alisa Avery.

The case went to trial in December of 1983. During the trial, Alisa Avery repeatedly renewed her motions for severance. These motions were denied. The government's case consisted largely of the testimony of Tracy Winn. Her testimony was that she distributed cocaine provided by Arthur and Alisa Avery. Pete Schneider testified that he had also distributed narcotics provided by the Averys. The government's case was further supported by documentary evidence which essentially corroborated Ms. Winn's story that she had made several trips to Cleveland, Ohio to sell drugs and that she wired money back to Alisa Avery.

The credibility of Winn and Schneider was the subject of most of the collateral evidence introduced by both sides. Furthermore, it was the unchallenged focus of the closing argument.

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[2] The original indictment charged the appellant Arthur B. Avery, Sr. with two counts of perjury before the grand jury in violation of 18 U.S.C. § 1623. Prior to trial, the district court granted his motion to sever one of the perjury counts. The motion to sever the other perjury count was denied.

II. THE LEGAL ISSUES IN CONTEXT

A. *The Severance Motion*

[1-4] Appellants argue that the perjury count against Arthur Avery was improperly joined with the other counts. Alisa Avery further argues that the government's use of her father's grand jury testimony violated her constitutional rights pursuant to the confrontation clause of the Sixth Amendment. The propriety of the joinder in a multi-party indictment is evaluated under Fed.R.Crim.P. 8(b).[3] Rule 8(b) is designed to prevent the accumulation of prejudice that occurs when several defendants are charged with similar but unrelated offenses. *United States v. Donaway*, 447 F.2d 940 (9th Cir.1971). Generally, the test for whether counts are misjoined under Rule 8(b) is whether the acts alleged in the indictment are unified by some substantial identity of facts or participants. *United States v. Butera*, 677 F.2d 1376 (11th Cir. 1982). If the counts are improperly misjoined under Rule 8(b), then the misjoinder is prejudicial per se. *United States v. Levine*, 546 F.2d 658 (5th Cir.1977). However, even if the counts are properly joined under Rule 8(b), the defendant is still entitled to a severance if he can show specific and compelling prejudice due to the counts being joined. *Butera, supra*, 677 F.2d at 1385. Its determination is usually made by asking whether a jury can keep the evidence against each individual defendant differentiated.

The courts have recognized, however, that the fact that a perjury count is joined with other counts does not necessarily constitute a violation of Rule 8. *United States v. O'Connell*, 703 F.2d 645, 648 (1st Cir.1983). The First Circuit observed in a case involving conspiracy to receive stolen goods and perjury before a grand jury investigating the theft that the sufficient, " 'relatedness of offenses can be established by demonstrating that essentially the same facts must be shown for each of the consolidated crimes.' " (citations omitted). *See also United States v. Duzac*, 622 F.2d 911, 913 (5th Cir.) *cert. denied*, 449 U.S. 1012, 101 S.Ct. 570, 66 L.Ed.2d 471 (1980).

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[3] Fed.R.Crim.P. 8(b) provides:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all the defendants need not be charged in each count.

1. *Arthur Avery*

[5] As to appellant Arthur Avery, we hold that there was no misjoinder. Mr. Avery testified before a previous grand jury about events related to the substantive counts he and his daughter were tried for in this case. The government contended at trial that in order to believe that Mr. Avery perjured himself the jury had to believe that he participated in the conspiracy alleged in the substantive counts. Therefore, the facts underlying the perjury in the other counts were sufficiently related so they can be deemed to be part of the same transaction.

[6] Further, we find no specific and compelling prejudice that warranted a severance as to Arthur Avery pursuant to Fed.R.Crim.P. 14, which commits the severance ruling to the discretion of the trial court.[4]

The two primary examples of prejudice asserted by Arthur Avery center around a reference to a separate criminal case and a reference to gambling on professional sports. We find no specific and compelling prejudice against Arthur Avery from the admission of these statements. Had there been no joinder, evidence concerning the conspiracy, travel, and possession counts would still have been admissible in a separate perjury trial to show the falsity of appellant's statements as well as his motive and intent to lie.[5] Additionally, the district court instructed the jury that the grand jury transcript was only to be considered as to the perjury count. Furthermore, the court deleted material prejudicial to Arthur from the transcript.

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[4] Fed.R.Crim.P. 14 states:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

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[5] Although evidence concerning the perjury count might not have been admitted at the conspiracy trial had count 6 been severed, Arthur Avery's conviction on the remaining counts of the indictment did not rest on the perjury count evidence. Rather, the government's case rested essentially on the testimony of Tracy Winn and Pete Schneider.

2. *Alisa Avery*

[7-9] As to Alisa Avery we reach a different conclusion. In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) the Supreme Court held that the admission of a non-testifying codefendant's confession that implicated petitioner, a co-defendant, violated the petitioner's right of cross-examination secured by the confrontation clause of the Sixth Amendment. 391 U.S. at 126, 88 S.Ct. at 1622. The court reasoned that a jury cannot effectively disregard a confessor's extra judicial statement that his co-defendant participated with him in committing the crime. *Id.* As this circuit has recognized, the admission of an out-of-court statement admissible only against one non-testifying co-defendant that implicates another co-defendant can present the compelling prejudice that requires a severance, regardless of whether the trial court gives a limiting instruction. *United States v. Astling*, 733 F.2d 1446, 1454 (11th Cir.1984). We find such compelling prejudice here.[6]

The district court here did redact portions of the grand jury transcript that it considered prejudicial. However, one very significant statement by Arthur Avery was presented to the jury. When he testified before the grand jury the following colloquy took place:

> Q. But your daughter did admit to you that she had gotten the dope to give to those people—
> A. [Arthur Avery] Yes, sir.
> Q. —to sell to those people; is that correct?
> A. [Arthur Avery] Yes, sir.

Clearly, a father's statement that his daughter had admitted to him that she had sold drugs and obtained drugs to sell to people, under the circumstances of this case provides specific and compelling prejudice to warrant a severance. The appropriateness of a severance in this case was highlighted by the fact that the district court had already severed one of the perjury counts. It would have not have been an undue burden on the government

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[6] As we hold that there was a *Bruton* violation in this case, we will not examine the issue of whether there was misjoinder as to Alisa Avery under Fed.R.Crim.P. 8.

to prosecute both perjury counts together. This would have given appellant Alisa Avery safeguards and protected her from the prejudice caused by her father's grand jury statement.

Furthermore, we cannot conclude that the admission of this grand jury testimony was harmless error. The essence of the government's case was the testimony of Tracy Winn. Her testimony was corroborated in part by Pete Schneider and also by documentary evidence that verified specific parts of her testimony concerning travel to different locations to distribute cocaine. Due to the fact that the credibility of Winn and Schneider was the key element in this trial and the fact that Winn was an accomplice, we find that the evidence of guilt was not so overwhelming as to render the *Bruton* violation harmless error. This is especially true in light of the fact that it was Alisa Avery's father who made the statement that his daughter had admitted to him that she was the source of cocaine. Therefore, Alisa Avery's conviction must be reversed.

B. *Prosecutor's Closing Statement*

[10, 11] During rebuttal argument the prosecutor made the following statement:

> It's been suggested to you there was some evidence on this record that Tracy Winn threatened to get revenge. Whose testimony was that? If you are going to come up with a reason for the testimony presented by those witnesses and if that reason is going to be that you have concluded that they have lied out of some motivation that was improper, then you should acquit these Defendants. Is that what you believe? Was there anything in the testimony concerning their agreements as to what they would do that suggested these agreements were based on lying? Were those agreements based on the necessity of their ensuring or doing good enough to convict somebody? We suggest to you there is

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[7] The government argues that Arthur Avery's testimony does not constitute a *Bruton* violation because his testimony before the grand jury did not constitute a confession but rather involved his denials of complicity in drug trafficking. We reject this position. *Bruton* is not limited to confessions. The self-incriminatory nature of the statement is immaterial. It is the fact that it incriminates a defendant other than the non-testifying declarant that abridges the co-defendant's constitutional rights of confrontation. *Bruton* holds that any extra judicial statement of one defendant, not otherwise admissible against his co-defendant, may not be introduced in the co-defendant's trial.

> no evidence of that. If you were to believe that, ladies and gentlemen, then you would have to believe that the Government of the United States is an active participant with them in that conspiracy.

Record, Vol. V at p. 141.

Appellants' second argument on appeal urges that the government improperly vouched for its witnesses. This statement, the government maintains, was in response to an argument made by Arthur Avery's counsel that the government had essentially purchased Tracy Winn's testimony: "Tracy Winn is literally the best testimony money can buy, for a forty-eight hundred dollar down-payment and fifteen hundred dollars a month." *Record*, Vol. V at 117.[1]

The concept of invited reply emerged first in *Lawn v. United States*, 355 U.S. 339, 359-60 n. 15, 78 S.Ct. 311, 322-323 n. 15, 2 L.Ed.2d 321 (1957). In *United States v. West*, 680 F.2d 652 (9th Cir.1982) the court in discussing invited reply said that defense counsel's statement must involve an attack on the government and its conduct of the case. *Id.* at 656. If such an attack is made, the prosecutor may present what even amounts to a boisterous argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon the government or its witnesses. *United States v. Dorr*, 636 F.2d 117, 120 (5th Cir. Unit A 1981).

We have examined the above statements made by both defense counsel and the government in the contexts of the entire closing argument. Although we do not condone the prosecutor's argument, we do not believe, that under the circumstances of this case and the remarks made by defense counsel, that the prosecutor's rebuttal statement constituted error. The U.S. Attorney's argument was a direct response to and was provoked by defense counsel's argument. Appellants cannot complain of a purported

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[1] The statement referred to the fact that Tracy Winn had been accepted under the government's Witness Protection Act.

error that they invited. *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir.1983).[9]

The conviction of Arthur B. Avery, Sr. is affirmed. The conviction of Alisa D. Avery is reversed and remanded for a new trial.

AFFIRMED in part, REVERSED in part and REMANDED.

[9] Alisa Avery maintains that her counsel did not make the remark that allegedly invited the response and therefore, even if the prosecutor's statement was invited reply, she was still prejudiced by it. As we have reversed her conviction under the *Bruton* violation, we express no opinion on whether under the facts of another case this may warrant relief.

APPENDIX B

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARTHUR B. AVERY, SR., and ALISA D. AVERY,
Defendants-Appellants.

No. 84-3084.

United States Court of Appeals,
Eleventh Circuit.

Aug. 12, 1985.

Defendant was convicted before the United States District Court for the Middle District of Florida, Ben Krentzman, J., of federal narcotics laws violations, and he appealed. The Court of Appeals, 760 F.2d 1219, affirmed in part, reversed in part, and remanded. On petition for panel rehearing, the Court of Appeals held that even assuming prosecutor's vouching remarks exceeded permissible bounds when considered in context of entire trial, any error was harmless.

Petition denied.

Criminal Law 1171.3

Even assuming prosecutor's vouching remarks exceeded permissible bounds when considered in context of entire trial, any error was harmless.

Stuart C. Markman, Tampa, Fla., for A.B. Avery.

Claude H. Tison, Jr., Tampa, Fla., for A.D. Avery.

Robert T. Kennedy, Asst. U.S. Atty., Tampa, Fla., Janis Kockritz, U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING

(Opinion May 21, 1985, 11 Cir., 1985, 760 F.2d 1219).

Before RONEY and CLARK, Circuit Judges, and SIMPSON, Senior Circuit Judge.

PER CURIAM:

On petition for panel rehearing, appellant Arthur Avery urges that we failed to analyze the prosecutor's alleged improper vouching remarks in the context of the entire trial as required by *United States v. Young*, ____ U.S. ____, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Even assuming the prosecutor's remarks exceeded permissible bounds, we would still conclude that any error was harmless. *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); *United States v. Young*, ____ U.S. ____, 105 S.Ct. 1038, 1045 n. 10, 84 L.Ed.2d 1 (1985).

IT IS ORDERED that the petition for rehearing by appellant Arthur B. Avery, Sr., filed in the above entitled and numbered cause be and the same is hereby DENIED.

Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-508

In the Supreme Court of the United States

OCTOBER TERM, 1985

ARTHUR B. AVERY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

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QUESTIONS PRESENTED

1. Whether remarks made during the prosecutor's rebuttal argument constituted harmless error.

2. Whether a perjury count on which petitioner was acquitted was properly joined with other counts of the indictment under Fed. R. Crim. P. 8(b).

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Rule 8 2
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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-508

ARTHUR B. AVERY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A1-A10) is reported at 760 F.2d 1219. The opinion of the court of appeals on denial of rehearing (Pet. App. B1-B2) is reported at 767 F.2d 1494.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1985, and a petition for rehearing was denied on August 12, 1985 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on September 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner and co-defendant Alisa Avery were convicted on one count of conspiring to distribute controlled substances, in violation

of 21 U.S.C. 841(a)(1) and 846, two counts of traveling and using facilities in interstate commerce in connection with their illegal business enterprise, in violation of the Travel Act, 18 U.S.C. 1952, and one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner was acquitted on one count of perjury, in violation of 18 U.S.C. 1623. He was sentenced to eight years' imprisonment on the conspiracy count, a suspended sentence and two years' probation on each of the Travel Act counts, and a concurrent term of eight years' imprisonment on the possession count, to be followed by a three-year special parole term. In addition, petitioner was directed to contribute $10,000 to Dacco, Inc. The court of appeals affirmed petitioner's convictions and reversed those of Alisa Avery. Pet. App. A1-A10, B1-B2.

1. Prior to trial, the district court denied petitioner's motion under Fed. R. Crim. P. 8 and 14 to sever a count of the indictment charging him with perjury before a grand jury investigating his activities and those of his daughter, co-defendant Alisa Avery.[1] The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner and his daughter conspired with Tracy Winn and Frederick Schneider to distribute large quantities of cocaine in Tampa, Florida and Cleveland, Ohio.[2] Petitioner was the source for the cocaine. Alisa Avery worked as the middleman, distributing the drug to lower-level distributors such as Winn and Schneider and collecting payments from them. Winn and Schneider dealt directly with petitioner as well as

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[1]The district court ordered the severance of another perjury count, as to which petitioner stated that he would testify on his own behalf. Pet. App. A4.

[2]Prior to trial, Winn and Schneider entered into plea agreements with the government. Each testified for the government at trial.

with Alisa Avery. Pet. App. A4; III R. 93-98, 100-109, 111-116, 120, 126-135, 143-145; IV R. 13-26, 44-47, 66-71, 131-134, 139-140.

In closing argument, counsel for petitioner argued that Winn was not credible and that she had everything to gain by lying because she had entered into a plea agreement with the government. Counsel further argued that Winn's evidence was "the best testimony money can buy, for a forty-eight hundred dollar down-payment and fifteen hundred dollars a month"—a reference to Winn's acceptance into the witness protection program and the government's payment of her subsistence. Pet. App. A9. In rebuttal, the prosecutor argued that there was nothing in the plea agreements that required any witness to lie and that the agreements were not "based on the necessity of [the witnesses'] ensuring or doing good enough to convict somebody." *Id.* at A8. To believe otherwise, the prosecutor stated, the jury "would have to believe that the Government of the United States is an active participant with them in that conspiracy." *Id.* at A9.

2. The court of appeals affirmed petitioner's convictions. Pet. App. A1-A10, B1-B2.[3] Although it did "not condone the prosecutor's argument," the court of appeals ruled that his remarks did not constitute improper vouching for the government's witnesses because the rebuttal "was a direct response to and was provoked by defense counsel's argument." *Id.* at A9. The court also concluded that the perjury count, on which petitioner was acquitted, was properly joined with the other counts because the underlying facts of the offenses were "sufficiently related so they can be deemed

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[3]The court of appeals reversed Alisa Avery's convictions on the ground that the introduction of petitioner's grand jury testimony concerning Alisa Avery's distribution of illegal drugs was barred by *Bruton* v. *United States*, 391 U.S. 123 (1968). Pet. App. A7-A8.

to be part of the same transaction" under Fed. R. Crim. P. 8(b). Pet. App. A6. The court of appeals also determined that no severance was required under Fed. R. Crim. P. 14 because joinder of the perjury count did not prejudice petitioner with respect to the other counts. Pet. App. A6 & n.5. In denying petitioner's petition for rehearing, the court of appeals stated that even if the prosecutor's remarks during rebuttal were improper, the court "would still conclude that any error was harmless." *Id.* at B2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's factbound claims is unwarranted.

1. Petitioner argues first (Pet. 6-15) that the prosecutor's rebuttal argument denied him a fair trial. The court of appeals determined on the basis of its review of the record that the prosecutor's remarks, even if error, were harmless. Pet. App. B2. This conclusion is plainly correct. The rebuttal represented a fairly limited response to petitioner's counsel's improper suggestion that the government had knowingly purchased perjured testimony. While not commendable, the remarks "did no more than respond substantially in order to 'right the scale,' " and therefore do "not warrant reversing [petitioner's] conviction." *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 11 (footnote omitted). Moreover, although most of the testimony against petitioner was provided by Winn and Schneider, it was corroborated by documentary evidence such as proof of Winn's trips to prospective purchasers. In these circumstances, there is no reason to review the court of appeals' conclusion that the error, if any, was harmless. See, *e.g.*, *United States* v. *Bryant*, 770 F.2d 1283, 1291-1292 (5th Cir.

1985); *United States* v. *Swafford,* 766 F.2d 426, 428 (10th Cir. 1985).[4]

Contrary to petitioner's contention (Pet. 6-9), that fact-specific conclusion does not (and indeed by its nature virtually cannot) conflict with the decisions of other courts of appeals that other improper prosecutorial comments were not harmless on different facts. In any event, the cases cited by petitioner involved far more egregious remarks, such as misstatements of the law and references to prior offenses not in the record, and situations where the evidence supporting the defendants' guilt was significantly weaker, such as where an earlier trial had resulted in a hung jury. In *United States* v. *Dorr,* 636 F.2d 117 (5th Cir. 1981), on which petitioner primarily relies, the prosecutor's comments implied that defense counsel was arguing that federal and state judges were involved in a conspiracy to convict the defendant. The court there stated that it "may have found no difficulty with the prosecutor's closing argument" had his comments been confined in a manner similar to those of the prosecutor here. *Id.* at 120.

2. Petitioner also contends (Pet. 16-20) that the perjury count was misjoined under Fed. R. Crim. P. 8(b). He apparently does not dispute the general proposition that perjury counts may be joined with counts charging offenses related to the subject of the perjury, as here. See Pet. 18; see also, *e.g., United States* v. *O'Connell,* 703 F.2d 645, 648-649 (1st Cir. 1983); *United States* v. *Duzac,* 622 F.2d 911, 913 (5th Cir.), cert. denied, 449 U.S. 1012 (1980); *United*

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[4]Petitioner is clearly wrong in arguing (Pet. 11) that the court of appeals' conclusion that the *Bruton* error with respect to his co-defendant was not harmless mandates a like result as to his claim. Petitioner's acknowledgment of his daughter's guilt—the admission of which the court of appeals found to be erroneous—quite obviously had a more direct impact on the jury's deliberations than the remarks made by the prosecutor concerning the witnesses' plea agreements.

States v. *Jamar*, 561 F.2d 1103, 1105-1106 (4th Cir. 1977). Rather, petitioner contends only that the government's failure to prove the perjury charge at trial mandates reversal. It is well-established, however, that a failure of proof at trial does not, at least in the absence of prosecutorial bad faith (which is not alleged here), retroactively invalidate the initial decision to join offenses. *E.g.*, *Schaffer* v. *United States*, 362 U.S. 511, 513-517 (1960). And in any event, even if the perjury count were misjoined, the error plainly would be harmless in view of the absence of prejudice to petitioner as demonstrated by his acquittal on the perjury count, the district court's limiting instruction, and the fact that his convictions rested on evidence completely independent of that introduced in support of the perjury charge. See Pet. App. A6 & n.5; see generally, *e.g.*, *United States* v. *Bibby*, 752 F.2d 1116, 1122 (6th Cir. 1985), petitions for cert. pending, Nos. 84-1692 and 84-1851; *United States* v. *Seidel*, 620 F.2d 1006, 1009-1011 (4th Cir. 1980).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

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[5]The Eleventh Circuit has treated misjoinder as prejudicial per se. See Pet. App. A5. The question whether misjoinder is subject to the harmless error doctrine is currently pending before the Court in *United States* v. *Lane*, No. 84-744 (argued Oct. 9, 1985).

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